LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-874

CAROLINE DRAKE WHITE
MARY LYTLE WHITE, AND
NOAH LYTLE WHITE,

PETITIONERS

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDIX

WILLIAM J. BAXLEY
Attorney General of Alabama

WILLIAM T. STEPHENS
Assistant Attorney General
of Alabama

JAMES S. WARD
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

INDEX

SUBJECT INDEX

	Page
TABLE OF CASES	ii-iv
TABLE OF STATUTES	v
TABLE OF APPENDIX	vi
OPINIONS BELOW	1-2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2-3
REASONS FOR DENYING THE WRIT	3-15
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	17

TABLE OF CASES

Page

Adams v. State, 291 Ala. 224, 279 So. 2d 488 (1973) 10

Almota Farmers E & W Co. v. United States, 409 U.S. 470, 473-474, 93 S.Ct. 791, 35 L.Ed. 2d 1, (1973) 8, 9

Alyeska Pipeline Serv. v. Wilderness Soc., —— US ——, — S.Ct. —, 44 L.Ed. 2d 141, 147, 153 (1975) 5

Bell v. Bell, 214 Ala. 573, 108 So. 375 (1926) 4

Bowers v. Fulson County, 227 Ga. 814, 183 S.E.2d 347 (1971) 11

City of Vestavia Hills v. Randle, 292 Ala. 492, 296 So.2d 710 (1974) 4

County of Los Angeles v. Ortiz, 6 Cal.3d 141, 98 Cal Rptr. 454, 490 P.2d 1142 (1971) 11

Dohaney v. Rogers, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930) 10, 14

F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 128-129, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) 13

Johnson v. Gerald, 216 Ala. 581, 113 So. 447 (1927) 4

Mills v. United States, 363 F.2d 78, 80 (8th Cir. 1966) 8

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325-326, 13 S.Ct. 622, 37 L.Ed. 463 (1893) 5, 6, 10

Muskegon v. Slater, 379 Mich. 466, 152 N.W.2d 652 (1967) 11

Page

North American Realty Co. v. Milwaukee, 189 Wis. 585, 208 N.W. 489 (1926) 11

Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1933) 9

Ottumwa v. Taylor, 251 Iowa 618, 102 N.W.2d 376 (Iowa 1960) 11

Pacific Gas & Electric Co. v. Chubb, 24 Cal. App. 265, 141 P. 36 (1914) 11

Petition of Reeder, 110 Or. 484, 222 P. 724 (1924) 11

Richmond Elks Hall Ass'n v. Richmond Redevel Agcy., 389 F. Supp. 486, 490 (N.D. Cal. 1975) 11

Seban v. Dade County, 102 So.2d 706 (Fla. 1950) 11

Schneider v. Schneider, 36 Colo. 518, 86 P. 347 (1906) 11

Sittenfeld v. Tobriner, 459 F.2d 1137, 1139 (D.C. Cir. 1972) 8

United States v. Easement & Rt. of Way 100 Ft. Wide, Tenn, 447 F.2d 1317, 1319 (6th Cir. 1971) 10

United States v. 421.89 Acres of Land, More or Less, Etc., 465 F.2d 336-337 (8th Cir. 1972) 9, 10

United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53, 57 (9th Cir. 1968) 11

United States v. Miller, 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1942) 8, 9

Page

United States v. New River Collieries Co., 262 U.S. 341, 344, 43 S.Ct. 565, 67 L.Ed. 1014 (1922) 9

United States v. 100 Acres of Land, Etc., Marin Cty. Cal., 468 F.2d 1261, 1270 (9th Cir. 1972) 11, 14

United States v. 1131.60 Acres of Land, Richmond City, Ga., 355 F.Supp. 1093, 1096 (S.D. Georgia 1973) 11

United States v. Reynolds, 397 U.S. 14, 15-16, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970) 8

United States v. 20.53 Acres of Land, Etc., 478 F.2d 484, 488 (10th Cir. 1973) 8

United States v. 23.94 Acres of Land, Floyd Co., Com. of Va., 325 F.Supp., 330, 332 (W.D. Va. 1970) 11, 12

United States v. 2,353.28 Acres of Land, Etc., State of Fla., 414 F.2d 965, 972 (5th Cir. 1969) 11

Welton v. Iowa State Highway Commission, 211 Iowa 625, 233 N.W. 876 (1930) 11

White v. State, —— Ala. ——, 318 So. 2d 247, 248 (1975) 8

TABLE OF STATUTES

Page

Title 19, Section 1-31, Code of Alabama 1940 (Recomp. 1958) 4

Title 11, Section 1, Code of Alabama 1940 (Recomp. 1958) 4

Other Authorities:

Annot., 26 A.L.R.2d 1295 (1952) 11

4 A NICHOLS ON EMINENT DOMAIN §14.249(4) 11

TABLE OF APPENDIX

Page

Appendix A

Title 11, Section 1, Code of Alabama 1940 (Recomp. 1958) .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-874

CAROLINE DRAKE WHITE
MARY LYTLE WHITE, AND
NOAH LYTLE WHITE,

PETITIONERS

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The trial court, that being the Circuit Court of the Tenth Judicial Circuit for Jefferson County, Alabama rendered no formal opinion. Said court entered an order denying Petitioner's Motion To Tax Further Costs.

The opinion of the Alabama Supreme Court is reported at —— Ala. ——, 318 So.2d 247 (1975).

JURISDICTION

The Petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Alabama Supreme Court rendered September 11, 1975.

Petitioner applies for this writ of certiorari pursuant to the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

> ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

QUESTION PRESENTED

Whether the provision "just compensation" in the Fifth Amendment to the United States Constitution contemplates or includes attorneys' fees, expert witness fees, appraisal fees or other litigation expenses incurred by a landowner in an Eminent Domain proceeding instigated by a state.

STATEMENT OF THE CASE

Respondent adopts as substantially true and correct the

Statement of the Case contained in Petitioner's Writ of Certiorari. However, Respondent adds the following necessary and important facts:

The condemnation proceedings subject of Petitioner's Motion To Tax Further Costs was one involving the partial taking of 7.64 acres from a total of 9.38 acres, for highway purposes. The part of the land taken is improved with one two-story single family dwelling and a two-story garage on ground level with servant quarters on the second story. The tract is located in Birmingham, Alabama.

The Petitioner's Motion To Tax Further Costs was filed in the trial court on July 26, 1974; twenty-five days after the final judgment in the case was entered. This was the first time Petitioner attempted to raise the issue of whether attorneys' fees and other litigation expenses are to be included within the purview of the Fifth Amendment provision of "just compensation" in condemnation proceedings. No effort at all was made by Petitioner to raise this issue during the trial of this cause.

The above described Motion was set down for hearing on August 16, 1974. At said hearing, the trial court gave Petitioner every opportunity to offer evidence in support of the Motion, but Petitioner refused and declined to do so. At the termination of the hearing, the trial court overruled the Motion.

REASONS FOR DENYING THE WRIT

1. THE STATUTORY LAW OF ALABAMA PERTAINING TO EMINENT DOMAIN DOES NOT PROVIDE, SPECIFICALLY OR OTHERWISE, FOR ATTORNEYS'

FEES OR LITIGATION EXPENSES TO THE LANDOWNER IN CONDEMNATION PROCEEDINGS.

Although not presented by Petitioner, Respondent feels it important to bring to the attention of this Honorable Court the absence of any provision for attorneys' fees to the landowner in the general statutory law of Alabama pertaining to condemnation of public lands. Title 19, §1 - 31, Code of Alabama 1940 (Recomp. 1958). The condemnation proceeding subject of the instant case was instituted under and covered by these statutory provisions. The importance of the absence of such a provision is magnified when viewed in connection with the prevailing case law of the State of Alabama and of this Court.

It is a steadfast rule of law in the State of Alabama that attorneys' fees are not allowable unless they are authorized by statute, contract, or a recognized ground of equity. *City of Vestavia Hills v. Randle*, 292 Ala. 492, 296 So.2d 710 (1974); *Johnson v. Gerald*, 216 Ala. 581, 113 So. 447 (1927) *Bell v. Bell*, 214 Ala. 573, 108 So. 375 (1926). As so succinctly stated in *Johnson v. Gerald*, supra at 582:

> ". . . In the absence of contract, statute, or recognized ground of equity, there is no inherent right to have attorneys' fees paid by the opposing side. . . ."

Nor would any attempt to construe any particular statutory provision within the general statutory law of Alabama on condemnation of public lands, Title 19, §1 - 31, Code of Alabama 1940 (Recomp. 1958) to include attorneys' fees be proper. No statute within this statutory scheme provides for attorneys' fees. Title 11, §1, Code of Alabama 1940 (Recomp. 1958) provides:

> "*No fee charged unless expressly authorized* — The law of fees and costs must be held to the penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of this state."

The inescapable conclusion, therefore, is a statute must specifically provide for attorneys' fees before they are allowable and recoverable.

Finally, it is interesting to note that this Court has, as recently as last year, echoed and reaffirmed the same sentiments described above. In *Alyeska Pipeline Serv. v. Wilderness Soc.*, — US —, — S.Ct. —, 44 L.Ed.2d 141, 147, 153 (1975), this Honorable Court recognized both the principle that ordinarily the prevailing litigant is not entitled to collect a reasonable attorneys' fees from the loser and that absent statute or enforceable contract, litigants must pay their own attorneys' fees.

2. THE WORDS "JUST COMPENSATION" AS THEY APPEAR IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION MEAN A FULL AND PERFECT EQUIVALENT FOR THE PROPERTY TAKEN IN AN CONDEMNATION PROCEEDING.

A. Much is made by Petitioner of the Alabama Supreme Court's reliance on the case of *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893). It is incredible how Petitioner can say in good faith that the Alabama Supreme Court distorted the meaning of *Monongahela* or in any way used language out of context. Rather, it is Petitioner who misleads and

uses the language of *Monongahela* out of context in a feeble attempt to persuade this Court that attorneys' fees are included within the meaning of "just compensation."

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-339, 13 S.Ct. 622, 37 L.Ed. 463 (1893), Mr. Justice Brewer outlines in detail what a landowner is entitled to when his property is condemned. He insists that a landowner is entitled to the full and perfect equivalent of the property taken; this including the true value of the property taken. Mr. Justice Brewer explains that value of land is inexorably connected to its productivity which dictates the land's earnings. He emphasizes that in the *Monongahela* case a franchise to collect tolls on a river for the use of a company's lock and dam should be included in the land's taken value because this franchise represents part of the land's productivity and hence its value. However, no where does the *Monongahela* opinion hint, suggest or intimate that the compensation for land taken should be anything beyond the land's value.

Respondent does not seriously think there is much question that attorneys' fees are not part of the value of the land. Said fees in no way measure compensation because they do not represent productivity and therefore earnings which help define value.

This Court, speaking through Mr. Justice Brewer, gives us an eternal and ever applicable definition of just compensation in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-326, 13 S.Ct. 622, 37 L.Ed. 463 (1893):

> "The language used in the 5th Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power

in the government, the last, the one in point here, being 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. *And this just compensation, it will be noticed is for the property, and not to the owner.* Every other clause in this 5th Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken. . . ." (Emphasis added)

It is blatantly obvious that this language says that compensation is for the property taken and not to the owner of the property. There is no doubt that the awarding of attorneys' fees would be repugnant to the Fifth Amendment words "just compensation" as compensation to the owner rather than for the property.

The above quote was relied on by the Supreme Court of

Alabama in their holding that just compensation did not include attorneys' fees. *White v. State*, — Ala. —, 318 So.2d 247, 248 (1975). Petitioner tries to tell this Court that this language was used out of context by the Alabama Supreme Court to mislead and to strengthen their position. Respondent suggests this is not the case as this quotation should immediately follow the last full paragraph as it appears on page 16 of the Petition For Writ of Certiorari. Instead of inserting this quote at this point, Petitioner conveniently leaves it out and begins anew with the first full paragraph on page 16 with a passage from *Monongahela* which follows the quotation relied on by the Alabama Supreme Court. By leaving out the language of the *Monongahela* opinion which states "just compensation" is the full and perfect equivalent for the property taken, Petitioner misleads and uses words out of context to strengthen his admittedly weak position.

This Court, nor the federal appellate courts, have strayed from the definition of just compensation handed down in *Monongahela v. United States*, supra. The Court's decisions from *Monongahela* to the present all steadfastly hold that under the Fifth Amendment provision that private property shall not be taken for public use without just compensation, "just compensation" means the full monetary equivalent of the *property* taken. *Almota Farmers E & W Co. v. United States*, 409 U.S. 470, 473, 474, 93 S.Ct. 791, 35 L.Ed.2d 1, (1973); *United States v. Reynolds*, 397 U.S. 14, 15-16, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970); *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1942); *United States v. 20.53 Acres of Land, Etc.*, 478 F.2d 484, 488 (10th Cir. 1973); *Sittenfeld v. Tobriner*, 459 F.2d 1137, 1139 (D.C. Cir. 1972); *Mills v. United States*, 363 F.2d 78, 80 (8th Cir. 1966).

These citations could go on forever. The cases are legion

which apply the standard enunciated in the *Monongahela* case and thus limit compensation to the equivalent in money of the property taken.

B. To further dramatize the speciousness of Petitioner's argument, one must look at the formula utilized to best determine the full and perfect monetary equivalent for the property taken. Although variously expressed, the decisions of this Court, and of the lower federal appellate courts, uniformly maintain that compensation for property condemned is to be determined by the fair market value of that land.

This expression of market value as a standard of compensation is succinctly stated in *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1942):

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given' or, more concisely, 'market value fairly determined.'"

See *Almota Farmers E & W Co. v. United States*, 409 U.S. 470, 474, 93 S.Ct. 791, 35 L.Ed.2d 1, (1973); *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1933); *United States v. New River Collieries Co.*, 262 U.S. 341, 344, 43 S. Ct. 565, 67 L.Ed. 1014 (1922); *United States v. 421.89*

Acres of Land, More Or Less, Etc., 465 F2d 336-337 (8th Cir. 1972); *United States v. Easement & Rt. of Way 100 Ft. Wide, Tenn.*, 447 F.2d 1317, 1329 (6th Cir. 1971); *Adams. v. State* 291 Ala. 224, 279 So.2d 488 (1973).

By not even the most liberal definitions of fair market value would attorneys' fees be considered included. It appears axiomatic that the standard of fair market value operates to the exclusion of the landowners attorneys' fees or litigation expenses. The State must only pay for the land taken; that is compensation for the property and not to the owner personally. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-326, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

3. THE PROVISION FOR "JUST COMPENSATION" IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT INCLUDE ATTORNEYS' FEES AND EXPENSES.

This Honorable Court has previously addressed itself to the question of whether the provision for just compensation, as found in the Fifth Amendment, includes attorneys' fees and expenses. To this question this court unequivocally found that attorneys' fees and expenses were not embraced within the meaning of just compensation in eminent domain proceedings. In *Dohaney v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930), it was stated:

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

Since the Court's decision in *Dohaney*, many landowners' have argued that just compensation in condemnation proceedings should include attorneys' fees and litigation ex-

penses. This claim is based on the rationale that litigation expenses should be recovered because otherwise landowners' will have to pay these expenses from their damage award, which is computed on the basis of the value of the property, and therefore the landowners' will not have been justly compensated for the taking of their property. Such a contention has been squarely rejected by the federal courts and the overwhelming majority of state courts that have considered it. Rather, they hold that attorneys' fees and expenses are not embraced within the meaning of just compensation. *United States v. 100 Acres of Land, Etc., Marin Cty. Cal.* 468 F.2d 1261, 1270 (9th Cir. 1972); *United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53, 57 (9th Cir. 1968); *United States v. 2,353.28 Acres of Land, Etc., State of Fla.* 414 F.2d 965, 972 (5th Cir. 1969); *Richmond Elks Hall Ass'n v. Richmond Redevel. Agcy.*, 389 F. Supp. 486, 490 (N.D. Cal. 1975); *United States v. 1131.60 Acres of Land, Richmond City, Ga.*, 355 F. Supp. 1093, 1096 (S. D. Georgia, 1973); *United States v. 23.94 Acres of Land, Floyd Co., Com of Va.*, 325 F. Supp. 330, 332 (W. D. Va. 1970); *County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 98 Cal. Rptr. 454, 490 P.2d 1142 (1971); *Pacific Gas & Electric Co. v. Chubb*, 24 Cal. App. 265, 141 P. 36 (1914); *Schneider v. Schneider*, 36 Colo. 518, 86 P. 347 (1906); *Seban v. Dade County*, 102 So.2d 706 (Fla. 1950); *Bowers v. Fulson County*, 227 Ga. 814, 183 S.E.2d 347 (1971); *Ottumwa v. Taylor*, 251 Iowa 618, 102 N.W.2d 376 (Iowa 1960); *Welton v. Iowa State Highway Commission*, 211 Iowa 625, 233 N.W. 876 (1930); *Muskegon v. Slater*, 379 Mich. 466, 152 N.W.2d 652 (1967); *Petition of Reeder*, 110 Or. 484, 22 P. 724 (1924); *North American Realty Co. v. Milwaukee*, 189 Wis. 585, 208 N.W. 489 (1926). See Annot., 26 A.L.R. 2d 1295 (1952); 4 A NICHOLS ON EMINENT DOMAIN §14.249(4).

Petitioner would have this Court believe that the "trend"

is for State courts to reject the rule announced in *Dohaney*. However, this is just not the case. Cases cited by Petitioner to support this contention *all* involve a situation where a statute or rule specifically provided for attorneys' fees in condemnation cases. (Petition For Writ of Certiorari page 8). None of these cases hold that the landowner is entitled to attorneys' fees within the constitutional meaning of "just compensation", absent a statute or contract. Moreover, this "trend" identified by Petitioner only involves cases from four states. The only conclusion is that Petitioner can find no case which holds, absent a statute, that a landowner is entitled to attorneys' fees in a eminent domain proceeding.

Two final points need to be made before concluding. Much is made by Petitioner that since times have changed and eminent domain proceedings are now more complex and involved, therefore generating greater expense to a landowner, one whose property is taken by eminent domain should not have to bear the burden of defending the suit. Petitioner argues that attorneys' fees, expert witness fees, appraisal fees, etc. should all be paid to the condemnee by the condemnor as a matter of policy. According to Petitioner, fairness and the prevention of inequities require this Court to hold that attorneys' fees and expenses are to be included within just compensation.

Respondent would offer in opposition to the policy argument advanced by Petitioner the conclusion of the House Committee that studied for three years the Federal Real Property Acquisition programs. This study was recognized and quoted in *United States v. 28.94 Acres of Land, Floyd Co., Com. of Va.*, 325 F. Supp. 330, 332 (W.D. Va. 1970) in discussing the propriety of including attorneys' fees within just compensation:

> ". . . The House Committee on Public Works, the 88th Congress, Second Session, 1964, after more than three years study of Federal Real Property Acquisition programs, determined that litigation expenses only in limited circumstances should be paid by the United States, and concluded as follows:
> 'Ordinarily, the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to increased litigation is evident. Earlier recommendations relative to full fair value negotiation policies and payment of the highest reasonable price are believed to be more appropriate actions for safeguarding the interests of property owners and the public.' "

This Honorable Court recently had occasion to discuss and reject the argument that full compensation requires an award of litigation expenses including attorneys' fees. In *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 128-129, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) Mr. Justice Marshall had this to say:

> ". . . We recognize that there is some force to the argument that a party who must bear the costs of his attorneys' fees out of his recovery is not made whole. But there are countervailing considerations as well. We have observed that 'one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel . . .' Moreover, 'the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorneys' fees', ibid., has given us pause, even though courts have regularly engaged in that endeavor in the

> many contexts where fee shifting is mandated by statute, policy, or contract. Finally, there is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues." (cases omitted)

The final point to make concerns the timeliness of the request for attorneys' fees and litigation expenses. It is undisputed in the instant case that Petitioner waited until twenty-five days after the final judgment to raise the issue of the inclusion of attorneys' fees and litigation expenses. It is also undisputed that at the hearing on the motion filed requesting attorneys' fees and litigation expenses be included in the award, Petitioner was given the opportunity, yet offered no proof in support of his motion.

One federal circuit court has suggested that the above described procedure would result in a waiver of any claim for attorneys' fees and litigation expenses. In *United States v. 100 Acres of Land, Etc., Marin Cty, Cal.*, 468 F.2d 1261, 1270 (9th Cir. 1972) it was contended that the trial court should have also awarded, as just compensation, the expenses and disbursements incurred in the litigation. This question had been raised for the first time subsequent to the jury verdict. After stating that the litigant was not entitled to attorneys' fees and expenses based on *Dohaney v. Rogers*, 281 U.S. 362, 268, 50 S. Ct. 299, 74 L.Ed. 904 (1930), the Court stated:

> "Without reliance on *Donhaney*, we do not consider it necessary to discuss the merits of this contention since the record reveals that there was no attempt to present evidence to the jury in regard to litigation expenses. If, as Drake's Beach contends, litigation expenses are a

part of just compensation to be awarded, it follows that evidence in regard to such expenses should have been presented to the trier of fact."

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Alabama should be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama

William T. Stephens

WILLIAM T. STEPHENS
Assistant Attorney General
of Alabama

James S. Ward

JAMES S. WARD
Assistant Attorney General
of Alabama

CERTIFICATE OF SERVICE

I, William T. Stephens, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, and I, James S. Ward, one of the attorneys for respondent, hereby certify that on this 11th day of February, 1976, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendix on the Honorable John H. Lavette, whose address is 3416 10th Avenue South, Birmingham, Alabama 35205, attorney for petitioners, by mailing said copies to him at the aforesaid address with the postage prepaid.

William T. Stephens

WILLIAM T. STEPHENS
Assistant Attorney General
of Alabama

James S. Ward

JAMES S. WARD
Assistant Attorney General
of Alabama

250 Administrative Building
Montgomery, Alabama 36130

APPENDIX A

§ 1. (7255, 7295) (3693) (1353) (3665) (5017) (3534) (3063) **No fee charged unless expressly authorized.**—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of this state.